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**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

DECISION

FCP/143330

PRELIMINARY RECITALS

Pursuant to a petition filed August 24, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. in regard to Medical Assistance/Family Care, a hearing was held on October 11, 2012, at Milwaukee, Wisconsin.

The issue for determination is whether the Petitioner is responsible to pay room and board charges for her stay at a CBRF during the period of September 7, 2011 – October 6, 2011.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Andy Erickson
Community Care Inc.
1555 S. Layton Blvd.
Milwaukee, WI 53215

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County. She is enrolled as a Family Care member through Community Care.

2. Petitioner requested a transitional placement at Country View CBRF to receive assistance during a depressive episode. She was a resident of the CBRF from September 7, 2011 – October 6, 2011.
3. The agency completed Formula to Determine Amount of Income Available to Pay for Room and Board in Substitute Care for the Petitioner with an effective date of September 7, 2011. The cost of room and board at the facility was \$750/month. The amount determined to be available to the Petitioner to pay room and board was \$353.07/month.
4. Petitioner was informed by the agency on September 19, 2011 that she would be charged room and board for her stay at the CBRF based on the September 7, 2011 determination that the Petitioner had income available to pay room and board. The total amount of room and board charged to the Petitioner for her stay is \$378.45 (\$313.20 for September and \$65.25 for October).
5. Petitioner had transitional stays at group homes in the past for similar reasons but was not charged room and board for previous stays.
6. On January 13, 2012, the agency sent a notice of room and board past due to the Petitioner. Subsequent past due notices were sent to the Petitioner on February 8, 2012, March 8, 2012, April 10, 2012, May 8, 2012, June 8, 2012, July 10, 2012 and August 10, 2012.
7. On April 27, 2012, the Petitioner filed a grievance with the agency. On June 7, 2012, the agency issued a decision informing the Petitioner that she is responsible to pay room and board.
8. On August 24, 2012, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The Family Care Program, which is supervised by the Department of Health and Family Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized under Wisconsin Statutes, § 46.286, and is described comprehensively in Wisconsin Administrative Code Chapter HFS 10. The program is operated and administered in each county by a Care Management Organization (hereafter referred to as “CMO”). In this case, the CMO is Community Care.

Medicaid waiver funds may not be used to pay for costs associated with room and board in a substitute care living arrangement. Because room and board cannot be covered with Medicaid waiver funds it is generally paid for with the participant’s resources. Medicaid Waivers Manual Appendix J-1.

In a CBRF setting, a distinction is made between the cost of care/supervision and cost of room and board. FC and the calculated cost share for a member cover costs related to care/supervision. Room and board is the responsibility of the member. The MCO is required to calculate the amount of income a member has available for room and board based on the member’s monthly earned income and deductions for health insurance premiums, medical/remedial expenses, special exempt income, family maintenance allowance, spousal income allocation and cost share. There is also an earned and unearned income disregard and discretionary income allowance. This calculation is required to be done at the time the member enters the facility. DLTC Numbered Memo Series 2010-05, March 5, 2010. The remaining income is the income that is available to the member for room and board. This is referred to as the member’s room and board obligation.

“If the member’s maximum room and board obligation is less than the facility’s actual room and board rate, the balance of the facility room and board costs may be paid by the MCO. (When members have insufficient income to pay room and board, the MCO may encourage the member’s family to provide additional support, negotiate with the provider to reduce the room and board portion of the facility rate the individual member, or subsidize the room and board costs the member cannot afford with MCO resources. Note

that the rate setting methodology for the long-term care portion of the MCO rate does recognize room and board as a reimbursable expense in future rate calculations).

If the member's maximum room and board obligation is greater than the facility's actual room and board rate, the excess represents additional discretionary income that is retained by the member. . .

DHS is aware that some members may have limited income available to pay the cost of room and board – especially Group C members due to the Group C spenddown eligibility determination and members who have allocated all or the largest portion of their income to their community spouse under Medicaid spousal impoverishment protection rules.” DHS Memo, December 7, 2007, “Cost Share and Room and Board for Members in Substitute Care”.

According to the memo, an MCO can choose to supplement a member's excess room and board costs if the member would need nursing home care without the supplementation and if the supplementation is less than the cost of room and board in a nursing home.

In this case, the Petitioner chose a facility with a room and board rate that exceeded the amount of income available for room and board. The Petitioner did not indicate disagreement with the calculation for her Petitioner's room and board obligation. Her dispute is over the lack of information provided to her with regard to the facility's room and board rate and her responsibility to pay for that excess expense.

In essence, Petitioner's is asserting an equitable estoppel argument that the agency/family care advice here misled her to her detriment, and that the Division of Hearings and Appeals should enter an order for the Petitioner to not be required to pay the room and board obligation. It is, however, the long-standing policy of the Division of Hearings and Appeals that the Division does not possess equitable powers. See, e.g., *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). The Division of Hearings and Appeals must limit its review to the law as set forth in statutes, federal regulations, administrative code provisions and program policies in accord with these laws. Accordingly, the Division of Hearing s and Appeals does not have authority under law to perform “equity” in the manner sought. The Petitioner's frustration at not being told of the cost of room and board for which she would be responsible at the time of entering the CBRF is understandable (compounded by the fact that she was mistakenly not charged for room and board on previous stays). There is no specific notice requirement for the agency as the waiver document is clear that Medicaid waiver funds may not be used for room and board in a CBRF. Therefore, the agency did not violate any provisions of the program in not providing notice to the Petitioner and DHA does not have authority to provide the equitable relief sought by the Petitioner.

CONCLUSIONS OF LAW

The Petitioner is responsible for the costs of room and board in the amount of \$378.45 for her stay in a CBRF during the period of September 7, 2011 – October 6, 2011.

THEREFORE, it is

ORDERED

That the petition be, and hereby is, dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new

evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 13th day of November, 2012

Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 13, 2012.

Community Care Inc.
Office of Family Care Expansion